IN THE

Supreme Court of the United States

October Term, 1975
No. 75-804

RICHARD T. HILL,

Petitioner-Respondent,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, *et al.*,

Defendants-Appellants.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF FOR PRELIMINARY OPPOSITION.

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Petitioner's references to the opinion below to the jurisdiction of this Court on a Petition for Certiorari are correctly set forth.

Question Presented.

The "question presented" as stated by Petitioner is incorrect and does not set forth the basis for the opinion of the Court of Appeal for the State of California nor properly reflect the record nor the basis for the State Court's application of the doctrine of preemption.

The question presented by this case is whether a State may impose compensatory and punitive damages against a Union regarding alleged acts of discrimin-

ation in hiring and dispatching policies of the hiring hall of a Local Union where the National Labor Relations Board has provided a remedy and where all substantive matters of the complaint and the alleged acts of job discrimination are within the exclusive expertise and jurisdiction of the National Labor Relations Board under the National Labor Relations Act of 1947 as amended. (61 Stat. 140, 29 U.S.C. Section 151, *et seq.*)

The State Court found that the crux of the action, the subject matter of the complaint, and the evidence presented involved the employment practices and dispatching procedures of the Local Union and that the case involved discrimination of employment against Petitioner and that the subject matter was within the exclusive jurisdiction of the National Labor Relations Board.

The Petitioner proceeded in the trial court on the theory which was accepted by the trial court that the State law tort of intentional infliction of mental distress was a tort action that could be superimposed as a remedy for Petitioner against Respondent on acts allegedly resulting from job discrimination and the operation of a Union hiring hall. Without regard to the National Labor Relations Board, the Petitioner's theory would allow a State Court, through a judge or a jury, to impose damages, general and punitive, against the Union for acts involving job discrimination and the operation of a Union hiring hall even though the Labor Board had taken jurisdiction and provided a remedy in the form of back pay to the Petitioner.

The question presented by Petitioner is whether the State can invade the exclusive jurisidiction of the Labor Board and impose general and punitive damages against

the Union for such job discrimination on the basis of forming allegations in a complaint on the theory of a State tort of intentional infliction of mental distress and thereby avoid the exclusive jurisdiction of the Labor Board.

An alternate ground presented by the Petitioner in the question presented appears to be a direct attack on the entire principle of Federal preemption and a request for the United States Supreme Court to overrule its longstanding and established preemption doctrine and in effect to overrule the long line of cases of *Garmon v. San Diego District Council of Carpenters,* 359 U.S. 326; *Gardner v. Teamsters Union,* 346 U.S. 485; *Ironworkers v. Perko,* 373 U.S. 701: *Plumbers v. Borden,* 373 U.S. 690; and *Motorcoach Employees v. Lockridge,* 403 U.S. 274 91 S.Ct. (1909).

Statement of the Case.

A. Introduction.

The Respondents, the United Brotherhood of Carpenters and Joiners of America, Local 25, and the Los Angeles County District Council of Carpenters and E. G. Daley (hereinafter referred to as "Respondent"), oppose the Petition for Writ of Certiorari on the grounds that the Court of Appeal for the State of California, Second Appellate District correctly decided the issues in this case. Petitioner filed for a Petition for Hearing before the California Supreme Court which was denied by the California Supreme Court on September 10, 1975.

The conduct involved, which formed the crux of the action and which involved substantially all of the testimony and exhibits in the case concerned the dis-

patchment and employment practices of the Respondent and alleged acts of employment discrimination against Richard T. Hill, (hereinafter referred to as "Petitioner"). The State Court correctly decided that such matters are within the exclusive jurisdiction of the National Labor Relations Board, hereinafter referred to as the "Labor Board" and the federal courts under the Labor Management Relations Act of 1947 (29 U.S.C. Section 151, *et seq.*). The State Court's opinion and holding is completely consistent with the doctrine of preemption as set forth by the United States Supreme Court in numerous cases and is consistent with the prior decisions of the California Supreme Court in applying the doctrine of preemption regarding employment practices of a labor union.

The Petitioner attempted to avoid the established doctrine of preemption by labeling the cause of action as an intentional infliction of mental distress and proceeded to trial and obtained a judgment on this common law tort for compensatory and punitive damages from a jury, although virtually all of the arguments, oral testimony and exhibits introduced at the trial involved a detailed accounting of the hiring practices and dispatching procedures of Local 25. The Petitioner attempted to avoid the application of the preemption doctrine which required that the regulation of the Union Hiring hall is to be within the exclusive expertise and jurisdiction of the Labor Board by attaching a new label to the type of relief requested.

On appeal to the Court of Appeal and upon a Petition for Hearing before the California Supreme Court, Petitioner shifted grounds and attempted to find other justifications for the trial court's error in

not dismissing the action at numerous stages of the trial on the grounds of preemption. On appeal for the first time, Petitioner raised the exceptions to the preemption doctrine which are set forth in the Petition for Certiorari as (1) protecting the interests of the State and Petitioner on matters of public health safety on such items as assault and battery and violence on a picket line; (2) the duty of fair representation; and (3) the claim of internal discipline by the Respondents as against Petitioner as a member of Local 25. Such alternative theories were urged for the first time on appeal before the Court of Appeal and the California Supreme Court in spite of the fact that it was entirely clear and absolute that during the course of the trial, Petitioner was proceeding on the first amended complaint that set forth the common law tort of intentional infliction of mental distress as an exception to the preemption doctrine. Petitioner proceeded on that theory and presented evidence and the conduct involved concerning the dispatching, hiring and employment practices of Local 25 and labeled the claim as a tort of intentional infliction of mental distress which the trial court allowed the jury to impose a substantial damage award in the form of compensatory and punitive damages.

The Court of Appeal and the California Supreme Court accepted the case on the basis presented by Petitioner during the entire course of the trial and determined correctly that the conduct complained of must be reviewed and not the label of the action and that the course of conduct complained of involved employment practices and the procedures and dispatching policies of Local 25 and a claim of employment

discrimination against Petitioner which were matters which were in fact brought before the Labor Board and where additional complaints could have been filed before the Labor Board where appropriate relief and remedies were available.

B. Summary of Facts.

The Summary of Facts is set forth in substantial detail in the Decision and Opinion of the Court of Appeal.

The original complaint was filed on April 17, 1969, by Petitioner against Respondent and certain other defendants who were subsequently dismissed from the case. [CT 1].[1] The Respondent filed a demurrer to the Complaint on the issue that the subject matter of the complaint was preempted by the Federal law and the Labor Board. [CT 24.] The Superior Court which is the trial court in the State overruled the demurrer. [CT 38.]

The Respondent filed an Answer denying the allegations and setting forth defenses that the complaint did not state a cause of action and that the subject matter of the complaint was preempted by the Federal law and exclusively within the jurisdiction of the Labor Board and the Federal Courts. [CT 39.]

The At Issue Memorandum was filed by Petitioner setting forth as the issue *"suit by Union member v. Unions charging dispatching discrimination"*. [CT 43.] (Emphasis added).

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[1]References to the Reporter's Transcript will be made herein by the letters "RT" followed by page numbers. References to the Clerk's Transcript will be made by the letters "CT", followed by page numbers.

Petitioner filed a first amended complaint and the Respondent filed demurrers to the four causes of action of the first amended complaint and the Superior Court sustained demurrers to the first, third and fourth causes of action. [CT 88, 123, 127, and 190.] The basis for the demurrers was on the ground that the subject matter was preempted.

As pointed out by the Court of Appeals in its Opinion, the cause of action was stated as follows:

> "The critical paragraph (13 of the Second Cause of Action reads: 'During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be by-passed for work assignments. During the same period, as aforesaid, Defendants and each of them, repeatedly threatened Plaintiff with actual or defacto expulsion from the Union in retaliation for his political activities, and further threatened to deprieve [sic] Plaintiff of his ability to earn a living as a carpenter.
>
> Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff.'
>
> The second cause of action further alleged that as a proximate result 'of the intentional and wrongful *discriminatory conduct* practiced by Defendants and each of them as aforesaid Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame';

(emphasis ours) to his general damage in the sum of $500,000.00. The complaint also alleged 'all of the aforesaid acts, conduct and *discrimination* by Defendants, and each of them was done deliberately and maliciously' (emphasis ours) for which Hill sought an additional $500,000.00 as punitive damages."

Respondent made numerous motions prior to and during the trial to dismiss the case on the grounds of preemption. [CT 215, 385, RT 1, 104, 218 and 1940.]

Respondent, following the entry of the judgment made a motion for a new trial before the Superior Court on several grounds including the basis that the subject matter of the case was preempted. [CT 581.]

The Superior Court denied the Motion for a New Trial, as well as refusing to order a remittitur on either the compensatory or punitive damages. [CT 644.]

ARGUMENT.

1. The State Court Correctly Determined That the Crux of the Action and the Subject Matter of the Complaint and the Evidence Presented Involved the Employment Practices and Dispatching Procedures and Claimed Discrimination of Employment Against Petitioner Which Were Exclusively Within the Jurisdiction of the Labor Board.

The doctrine of Federal preemption is a long and established principle of Federal Law that governs this case. The most comprehensive and articulate expression of the preemption doctrine is set forth in the basic case of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, S.Ct. 773. The United States Supreme Court held that even where the Labor Board refused to act on the merits of the claim where the matter was arguably subject to the provisions of the National Labor Relations Act, the State Courts were not permitted to grant damages and stated at page 244 as follows:

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the Federal Enactment requires that State jurisdiction must yield to leave the states free to regulate conduct so plainly within the central aim of the Federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than law specifi-

cally directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of the national purposes."

The *Garmon* case was applicable to a picketing situation of a Union against an employer. At a later date, the United States Supreme Court applied the principles of Federal preemption and exclusive Labor Board jurisdiction to cases where State Courts had allowed jury verdicts to stand against Labor Unions that were accused of engaging in discriminatory hiring or employment practices involving dispatching procedures of the Union.

In *Plumbers v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, the Plaintiff, a member of a plumbers Local, claimed that he lost an opportunity to work for a construction company because he was refused a job dispatch from the Union. The Plaintiff filed suit against the Local Union seeking damages under the Texas State law for the Union's refusal to dispatch him and alleged that the acts of the Plumbers Union constituted "willful, malicious and discriminatory interference with his right to contract and pursue a lawful occupation", and the Texas Court allowed the case to go to the jury who found that there was job discrimination and awarded damages for loss of earnings, mental suffering and punitive damages. It is important to point out that the allegations of the complaint in the *Borden* case were identical with the allegations in the present case. The United States Supreme Court held that the State Court did not have jurisdiction on the basis of Federal preemption.

In *Ironworkers v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, decided the same day as *Borden, supra*, the Supreme Court again upheld the principle of Federal preemption involving the claim of discriminatory conduct of a hiring hall of a Local Union and held that a State Court jury verdict in the amount of $25,000.00 for loss of employment was preempted and within the exclusive jurisdiction of the Labor Board.

In the *Borden* case, *supra*, the Supreme Court specifically stated as follows:

> "The suit involved here was focused primarily if not entirely on the union's action with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the Union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (Gonzales, 356 U.S. 618) concerning Borden's employment relations involved conduct arguably subject to the Board's jurisdiction.
>
> Nor do we regard it as significant that Borden's complaint against the Union sounded in contract as well as in tort. It is not the label that fixed the cause of action under State law that controls the determination of relationship between State and Federal jurisdiction. Rather, as stated in *Garmon*, supra, 246, 'our concern is with delimiting areas of conduct which must be free from State regulations if National Policy is to be left unhampered'.
>
> In the present case, the conduct on which the suit is centered, whether described in *terms of*

tort or contract is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." (Emphasis added.)

In *Tyree v. Edwards,* 287 F.Supp. 589, a three-member Federal District Court held that a law of the State of Alaska concerning the regulation of Union hiring halls was preempted by the exclusive jurisdiction of the Federal Law. The Supreme Court denied certiorari. (393 U.S. 405.) The importance of maintaining a National uniform policy concerning the regulations of Union hiring halls, was emphasized by the three-judge District Court in the *Tyree, supra,* case where the Court stated at page 594 as follows:

"We find that all concerned, the public, labor and employers are most efficiently served by authority vested by Congress in one Federal agency, empowered to reach across the entire nation and bring national consistency to the broad field of labor relations and the related complex problems arising thereunder. The result would be chaotic in the absence of such a consistent policy. Certainly, it is not intended that each of the hundreds of State Courts of the several states be at liberty, individually, to decide these issues, national in scope and implication. Congress so empowered the National Labor Relations Board. And to that agency, for these purposes, it granted exclusive jurisdiction."

In *Motorcoach Employees v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, the United States Supreme Court specifically reaffirmed *Borden* and *Perko* and distinguished and greatly limited *International Association of Machinists v. Gonzales,* 356 U.S. 617 on the basis that *Gonzales* was limited to the situation where a Union member was suing for restoration of Union membership and that *Gonzales* did not apply concerning a claim of a discriminatory hiring procedure and practices of a Union hiring hall or Union employment practices.

Petitioner attempts to avoid the preemption doctrine by arguing for the *first time on appeal* before the Court of Appeal, that one of the exceptions that has been established by the United States Supreme Court to the preemption doctrine applies to this case. It is important to point out that at no time during the course of the trial did Petitioner urge, or argue or present evidence regarding any exceptions to the preemption doctrine, except the theory that the common law tort of intentional infliction of mental distress is a new exception.

It is clear that none of the established exceptions to the preemption doctrine apply in this case. There was at no time any allegations, proof or evidence provided that there was any assault or battery or physical violence that would come within the exception of *United Automobile Workers v. Russell,* 356 U.S. 635, 78 S.Ct. 932 and *United Construction Workers v. Leburnum Construction Corp.,* 347 U.S. 656, 74 S.Ct. 833. There were no allegations in the complaint nor any evidence provided or any theories furnished that would come within the exception of *Linn v. Plantguard Workers,* 383 U.S. 53, 86 S.Ct. 657. There were no allegations nor any evidence presented nor any arguments made, or instructions given regarding

fair representation which would come within the exception of *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903. At no time did the Petitioner claim that he was expelled from Union membership and sought restoration to membership in Local 25 within the exception of *International Association of Machinists v. Gonzales, supra.*

Furthermore, there were no allegations nor any evidence presented nor instructions given regarding a breach of a collective bargaining agreement that would constitute a claim under Section 301 of the National Labor Relations Act, *supra.*

Finally, there was no claim nor any allegation in the pleadings nor any evidence nor instructions given that the Labor Management and Disclosure Act of 1947, (29 U.S.C. §411) was violated regarding the Respondent's Constitution and Bylaws on any internal discipline of the Petitioner. At no time was there an offer of proof or evidence presented or instructions given that the Petitioner was disciplined by Respondent under its Constitution and Bylaws regarding suspension, fine or expulsion, which would bring the case within one of the exceptions of the preemption doctrine under *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233, 28 L.Ed.2d 10.

2. The State Court Correctly Decided the Case Based on Established Application of the Preemption Doctrine Which Has Been Consistently Followed by the State Court.

The leading case in California on this issue is *Directors Guild of America v. Superior Court,* 64 Cal.2d 42, where the plaintiff filed a suit against a Union alleging damages and an injunction on the ground

that the Union arbitrarily excluded him from membership and discriminatorily barred him from employment. Subsequent to the filing of the Superior Court action, the plaintiff brought charges before the Labor Board alleging that the union had committed unfair labor practices.

The California Supreme Court concluded that where the complaint is founded upon employment and job discrimination, under *Borden, supra,* and *Perko, supra,* such matters were preempted and exclusively within the jurisdiction of the Labor Board. The California Supreme Court discussed the issue as to whether an employee has a right to compel membership in a labor organization. On this issue, the Court drew a careful distinction between matters that would affect employment relations and issues that affect exclusively union membership and held that all such matters on employment, even though founded on tort under the California law, must fall within the preemption doctrine. However, where the basis of the complaint involves union membership and the right to such membership, then the State Court does have jurisdiction. In this regard, the California Supreme Court drew this careful distinction in its final conclusion at page 54 as follows:

> "We conclude that the instant case does not present the matter for State Court relief; that the crux of the complaint necessarily pertains to employment relations rather than to union membership. As a result, as we have said, the Federal Act preempts. But, in so doing, we do not rule that preemption extends to the lawsuit which, in the words of Borden, 'focus on purely internal union matters, i.e., on relations between the individual plaintiff

and the union not having to do directly with matters of unemployment, . . .' (373 U.S. 690, 697). The Complaint which draws into issue the right to union membership alone involves the factors which we have discussed above; after a suit which met the foregoing requirements, relief at the State level would be appropriate".

On this basis the California Supreme Court has adopted the clear rule on federal preemption that where Union matters affect the relationships between the plaintiff and the union, having to do with matters of employment, then preemption applies and the State Court does not have jurisdiction. However, where the relationship is purely an internal matter, not involving employment relations, and is a matter of a claim of a right to union membership, then the State Court has jurisdiction.

The instant case is consistent with a long line of California cases following the doctrine of preemption. Any reversal of the California State Court in this case would severely dislocate and upset the established principles of law which have been followed in California for many years, drawing a clear line between employment relations where preemption applies and individual member's rights, fair representation, and internal union matters where the State law allows a cause of action. See *Pratt v. Local 63, Film Technicians,* 260 Cal.App.2d 545; *William Shaw v. Metro-Goldwyn-Mayer,* 37 Cal.App.3d 587; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Superior Court,* 20 Cal.App.3d 517; *Magallanes v. Local 300, Laborers International Union,*

40 Cal.App.3d 809, and *Breiteger v. Columbia Broadcasting System,* 43 Cal.App.3d 283.

Petitioner relies on *Alcorn v. Ambro Engineering, Inc.,* 2 Cal.3d 493. However, the *Alcorn* case has no application to the instant case as to the issue of Federal preemption and the exclusive jurisdiction of the Labor Board was not referred to at any time, nor involved in any way in the case. The *Alcorn* case held that there is a cause of action for an intentional infliction of mental distress on a pleading that an employer representative harassed and intimidated and used racial statements against an employee in a malicious manner which caused the employee to suffer emotional disturbance. Although the involved employee was a union steward, there was no claim made at any time that the Labor Board had jurisdiction or that the employer had committed an unfair labor practice or that any remedy was sought or available from the Labor Board. The *Alcorn* case did not involve employment conduct or the dispatching and hiring procedures of a Union or a claim of job discrimination by the employee that brought suit against the employer.

The decision of the State Court in the instant case was consistent with all prior decisions of the California Supreme Court and the Court of Appeal. The Court of Appeal correctly held that the substance or crux of the action must be looked at to determine whether preemption applies and not at the remedy sought or label of the cause of action as constituting a common law tort of intentional infliction of mental distress. The Court of Appeal correctly concluded that

the Petitioner had proceeded on a cause of action alleging that there was an intentional infliction of mental distress by virtue of the Union's operation of its hiring hall concerning the Petitioner and other carpenters and that there was a claim of a course of conduct that caused employment discrimination against the Petitioner and that this type of regulation of a Union hiring hall was within the exclusive jurisdiction of the Labor Board.

3. The State Court Was Correct in Its Conclusion That the Crux of the Petitioner's Case Involved the Employment Practices of Local 25 and a Claim of Job Discrimination Which Was Within the Exclusive Jurisdiction of the Labor Board.

There is no doubt that the jury was allowed by the Trial Court to hear substantial and overwhelming amount of evidence and review dispatching procedures on work lists, dispatch slips, referral slips involving Petitioner and hundreds of other carpenters that register and are dispatched from the hiring hall of Local 25. In effect, the jury was allowed to determine the legality and conduct of the hiring procedures of Local 25. It is clear that if a local jury can pass judgment on the legality of a union hiring hall, then there would be separate determinations throughout the country in the form of compensatory and punitive damages concerning a union's hiring hall procedures and the national policy of uniformity through the regulations of an expert administrative agency and the Federal Courts would be entirely destroyed. For this reason, the Court of Appeal held that the subject matter was preempted regardless of the title of the cause of action.

Respondent would review briefly by summary, the overwhelming number of witnesses and exhibits that were presented by the Petitioner to the jury that went to the conduct and operation of the hiring hall procedures of Local 25.

1. The opening statement by Petitioner's attorney described in great detail the dispatching procedures of Local 25 and outlined that Petitioner intended to prove that he was discriminated against concerning dispatching of jobs, being dispatched to inferior jobs while other members of the union were allowed to "sneak in" and he was sent on short jobs. [RT 148-162.] In addition, Petitioner's attorney, in the opening statement, spent a great deal of time discussing the Dinwiddy-Simpson job and reviewed the proceedings before the Labor Board. [RT 162-166.]

2. The testimony of Ken Scott, the current business agent of Local 25, was presented by Petitioner and involved a series of questions on the dispatching procedures and types of documents used by Local 25 on job referrals, out-of-work lists, request forms, and all other job dispatching procedures. Scott was questioned on dispatching such as signing in, dispatching "sneak ins", requests, rehires, and job transfers. [RT 421.]

3. Petitioner testified concerning the dispatching procedures and the fact that he was not dispatched to jobs from January to March, 1967. [RT 516-521.] He testified in great detail concerning the Dinwiddy-Simpson job which involved the construction of the Crocker Citizens Building at 6th and Grand in Los Angeles. [RT 540.] Petitioner's attorney read from the deposition of Charles Simpson, the superintendent of Dinwiddy-Simpson job, who testified that he had

verbally requested Petitioner to be dispatched. [RT 544-566.] In addition, Petitioner's attorney read from the testimony of Charles Simpson at a hearing before the Labor Board involving the identical situation as to whether Petitioner was discriminated against on employment at Dinwiddy-Simpson job. [RT 566.]

4. Petitioner testified that he filed charges with the District Council alleging that he had been bypassed on the out-of-work list because Local 25 was sending stewards out of order. [RT 594-597.]

5. Petitioner testified concerning other work referrals, including the referral by Gordon McCulloch from the District Council to the Vinnell job. [RT 1690.]

6. Petitioner's attorney stated that he had gone through all of the out-of-work lists up to March 1968. [RT 627.]

7. Petitioner testified concerning the Ruane job claiming he was discriminated against as other carpenters worked for a longer period of time. [RT 631-636.]

8. Petitioner testified that he refused a steel form job and was dispatched on May 1, 1968, to the William Burke job; however, there was no job there. [RT 644.]

9. Petitioner reviewed other jobs where he had been dispatched, such as Weymouth and Crowell [RT 656], the Speer job [RT 658], Progressive Transportation Company [RT 662] and others.

10. Petitioner specifically brought to the attention of the jury, the fact that the Labor Board had found that he was discriminated against with respect to the Dinwiddy-Simpson. Petitioner testified he filed a charge with the Labor Board and that the Labor Board found

that there was discrimination, and that a Notice to Cease and Desist such discrimination and to pay back wages was posted at the hall of the Local 25. [RT 671-674, see Pltf. Ex. 25, which is the Labor Board order finding discrimination on the part of Local 25 and issuing the Cease and Desist Order against further discrimination against Hill and awarding back pay.]

11. Petitioner specified names of political allies of Daley who he claimed received favorite treatment regarding dispatching and listed 16 names. [RT 1027.] Respondent objected to testimony concerning the listing of names of members and then alleging that such members were given favorite treatment in order to show the overall dispatching policies of the Union. [RT 1033.] The Trial Court denied the motion. [RT 1041-1058.]

12. Petitioner introduced further dispatching records to show that there was overall job discrimination. [RT 1049-1058.]

13. Petitioner's attorney recounted all of the out-of-work records he had reviewed for 1967, 1968, and 1969, as well as requests for each month in January, 1968 [RT 1100-1109.]

14. Petitioner called, as an adverse witness, the Respondent E. G. Daley. He was questioned at length regarding the hiring procedures of Local 25 concerning the out-of-work list, the referral system, the picking up of less than 16 hours of work, the signing of the out-of-work list, the stamping if a carpenter refuses a dispatch on two jobs, and had Daley review random out-of-work sheets. [RT 1114-1123.]

15. Petitioner had Daley select random names of carpenters on the out-of-work list to compare whether

such carpenters' dispatch was dispatch by request or by some form of discrimination. The random names were selected on no relationship to Petitioner's claim. The carpenters selected such as Smith, Dejon, Johnson, Mitchell, Roth, Nichols, and other names were used to show the general policy of alleged discrimination practices of Local 25. [RT 1123-1141.] Petitioner reviewed other names such as Faring, Meterlane, Judan, Fretcha, Montoya, Lopez, Clerin, Rodenfels, Lumbrecht, Wagnor, Potino, Elworth, Lopez and with other carpenters concerning whether they were requested or whether they were dispatched out of order. [RT 1142-1175.]

16. Petitioner questioned Daley on other employees that were dispatched such as Andrew Yukas, Lou Altman, Joseph Williams, George Hains, Ed Monty and other names. Respondent objected to the line of questioning on the general hiring practices of Local 25, by throwing out names of carpenters who were listed as being dispatched. [RT 1182-1200.]

17. Petitioner introduced exhibits involving dispatch slips and reviewing the requests and out-of-work lists with Daley and specifying individual carpenters and petitioner would name carpenters who were dispatched without regard to any acts of discrimination. [RT 1239-1339.]

18. Petitioner attempted to show that there was an overall pattern of discrimination and in effect putting the Local 25 dispatching procedures on trial and was not specifically limited to testimony as to the individual acts of discrimination against petitioner. [RT 1239-1339.]

19. Petitioner read to the jury, interrogatories and answers concerning the out-of-work and dispatching records of Local 25 from January 1, 1965, to January 1, 1969, to the effect that many of the files and records were with the Labor Board. [RT 1936.]

20. Petitioner introduced 102 exhibits of which the following exhibits related directly to the employment practices of Local 25 and involved the overall dispatching procedures of the Union. Most of the exhibits did not directly involve Petitioner, but were offered and allowed Petitioner to argue before the jury that Local 25 was engaged in a practice of job discrimination involving many carpenters and to award damages (particularly punitive damages) to punish the union for its overall hiring practices.

The exhibits referring to general employment practices were the following:

Exhibits 1, 2, 3, 4, 5, 7, 8, 16, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79, 80, 82, 83, 84, 85, 95, 96, 98, and 99.

Specifically, many of the out-of-work sheets were simply groups of records with referrals for periods of weeks or months which were presented for the only purpose of showing that Local 25 operated a discriminatory hiring hall for a period of time and was in no way related to any specific acts of discrimination against petitioner.

4. The Instruction Given by the Trial Court Regarding the Decision of the Labor Board That Local 25 Did Discriminate Against Petitioner on the Dinwiddy-Simpson Job and Instructing That the Labor Board Award of Back Pay and Allowing the Jury to Impose Damages Including Punitive Damages for the Same Conduct That Was Involved Before the Labor Board Brings This Case and Its Subject Matter and Conduct Within the Preemption Doctrine as the Instruction Allows a Clear Conflict on a Remedy Between the Labor Board and a Local Jury.

The requirement as to the application of the doctrine of preemption is established by the special instruction offered by the Petitioner and given to the jury that instructed the jury that the Petitioner had received a back pay award from the Labor Board and that the jury could award damages including punitive damages for the same conduct that was held to be in violation of the National Labor Relations Act and within the jurisdiction of the Labor Board.

The special instruction that calls for the doctrine of preemption and which was error, reads as follows:

> "PLAINTIFF'S SPECIAL INSTRUCTION NO:
>
> There has been received in evidence the fact that plaintiff filed a complaint within the National Labor Relations Board, a governmental agency, and received an award covering wages he would have earned on the Dinwiddy-Simpson job had he been dispatched on May 1, 1967.
>
> The National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws.
>
> The plaintiff in this action charges the intentional infliction of severe emotional distress and seeks damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages.
>
> The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage." [CT 531.]

Petitioner attempts to distinguish the current case from the cases of *Plumbers v. Borden, supra,* and *Ironworkers v. Perko, supra* which were held applicable to this case by the Court of Appeal by somehow finding a distinction that the *Borden* and *Perko* cases involved single acts of discrimination on job employment and that the Petitioner was involved in a series of job discrimination actions by the Union.

There is no such distinction set forth in the *Borden* and *Perko* cases by the United States Supreme Court. The principles set forth by the United States Supreme Court were that the employment and dispatching procedures of a Union engaged in interstate commerce are within the exclusive jurisdiction of the Labor Board and must be regulated and governed by the administrative agency that has expertise in labor management relations. The concern of the United States Supreme Court was to prevent State Courts and juries from imposing local standards and regulations of a Union hiring hall which would not comply with the uniform national labor policy.

However, even excepting, for sake of argument, the Petitioner's interpretation of the *Borden* and *Perko*

cases to the effect that such cases only apply on a single act of job discrimination, then it is clear that the Trial Court did not comply with the preemption doctrine in this case.

The Petitioner's special instruction, which is set forth above, refers to a specific act of job discrimination involving the Dinwiddy-Simpson job where the Labor Board had found that Local 25 had committed an unfair labor practice, and awarded back pay. Regarding the specific act of discrimination on a specific job, the Trial Court then instructed the jury that the jury could impose damages for,

> "intentional infliction of severe emotional distress and seek damages for pain and suffering for resulting medical expenses incurred and for punitive damages."

The Trial Court went on to instruct the jury that,

> "The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage."

It is clear that the Trial Court, acting on a specific act of job discrimination, involving the Dinwiddy-Simpson job that was within the Labor Board jurisdiction and where the Labor Board found a violation of the federal law and had awarded relief, then superimposed the State tort remedy of intentional infliction of mental distress for the identical act of discrimination that was the subject matter of the Labor Board jurisdiction.

The instruction by the Trial Court and the imposition of compensatory and punitive damages for an act of job discrimination regarding the union's hiring hall,

was the identical subject of the Labor Board jurisdiction. The Labor Board had jurisdiction on the Dinwiddy-Simpson job and did award a remedy which, within its expertise, fulfilled the objective of the National Labor Policy. The Trial Court allowed the jury to impose a substantial damage award against the Union for the identical act which has the direct impact of creating an additional remedy, over and above the Labor Board remedy. It would be difficult to find a better example of the danger that the United States Supreme Court has held must not exist, than the instant case in which a local jury was allowed to penalize and award damages against a Union on acts of job discrimination that are within the scope of the expertise of the national administrative agency.

5. The Remedies on Job Discrimination and Regulation of Hiring Halls Are Broad and Far Reaching and Effective as Implemented by the Labor Board and Do Not Justify Petitioner's Argument That the Preemption Doctrine Under Garmon Should Be Reversed on the Basis That the Labor Board Does Not Provide an Adequate Remedy in a Situation as the Current Case.

Petitioner argues that the United States Supreme Court should re-examine *Garmon* and in effect overrule *Garmon* and hold that the State Court has jurisdiction to grant compensatory and punitive damages to an employee who claims job discrimination and abuses concerning a Union operation of a hiring hall. The apparent basis for the petitioner's request for a re-examination by the United States Supreme Court of *Garmon* is the statement set forth in the conclusion of the Petition that states as follows:

> "As this case itself illustrates, such as vendettas, fueled as they are by passions which go far beyond the largely economic motivations assumed by the Act are scarcely likely to be deterred by the pin-prick remedial measures available to the Board, measures which are only minimally adequate for their primary intended purpose and largely inadequate to make whole the hapless victims of the kind of outrageous misconduct involved here."

In requesting the United States Supreme Court to reexamine *Garmon* on the basis of an inadequate remedy before the Labor Board, Petitioner completely fails to point out that the remedy for job discrimination and illegal operations of a Union hiring hall were expressly given to the expert administrative regulation of the Labor Board so as to create a National uniform policy.

As pointed out above, if a local jury such as in the instant case, after reviewing weeks of testimony and documents consisting of hundreds of exhibits that involve every detail of a Union hiring hall procedure, can then determine that the hiring has not been operated properly and award substantial damages as in this case, then it is clear the principle of the national uniform labor policy regarding Union hiring halls will be totally destroyed.

The Petitioner gives little faith or credibility to the ability and power of the Labor Board as a national expert administrative agency created by Congress to cure any evils that may exist concerning the operation of a Union hiring hall.

In the particular case involved, the Petitioner did file a charge before the Labor Board and had a hearing before a trial examiner and received an award in the form of back pay in the amount of $2,500.00. He had filed one other charge which he did not follow through on and there is no basis to indicate that he could not have filed a continuous number of charges before the Labor Board. The Labor Board has a great deal of power and authority and is not limited to ineffective remedies as urged by Petitioner. The Labor Board can issue broad Cease and Desist Orders which are a form of an injunction, can award back pay and if there is a wide pattern of discrimination concerning the operation of a hiring hall, (including the hiring hall of Local 25 as claimed by Petitioner), the Labor Board had the authority to supervise the Union so to prevent discriminatory practices.

The power of the Labor Board to fashion appropriate remedies in this particular area is no longer in question. The Labor Board has created a number of innovative remedies for hiring hall violations including orders for back pay and interest to alleged discriminatees. *NLRB v. Local 542*, 329 F.2d 512; *Local 1566, Longshoreman ILA*, 145 NLRB 1417; *Local 138, Operating Engineers*, 151 NLRB 102; *Local 925, Operating Engineers*, 168 NLRB 818; *Carpenters, Local 180*, 175 NLRB 150.

The Labor Board has gone as far as granting back pay relief to members of a class of discriminatees including those not named in the charge filed with the Labor Board. By such order, the Labor Board has the power to grant class action relief. *NLRB v. Midwest Transfer*, 287 F.2d 443 (3rd Cir. 1961).

The Labor Board has consistently taken jurisdiction over cases where a union has threatened an employee on hiring procedures *Longshoreman, ILA, Local 872 (Isaac Morning),* 163 NLRB 586 (1968). See *Carpenters District Council of New Orleans and Vicinity, Carpenters Local 1846,* 182 NLRB 11 (1970) where the Labor Board granted a remedy on a factual situation almost identical to the evidence presented by Petitioner in this case.

Another example of the broad powers of the Labor Board is the case of *Castleman and Bates,* 200 NLRB 72, where the Labor Board issued a Cease and Desist Order against a Union preventing it from maintaining, forcing or giving effect to exclusive hiring arrangements or practices where union members received preference or any manner restraining employees in exercise of their rights and ordered back pay. In addition, the Labor Board ordered the Union to keep permanent records of hiring and referral operations adequate to disclose fully the basis on which each referral is made and to make available upon request of the Regional Director of the Labor Board, inspection at all reasonable times, any records relating in any way to the hiring and referral system.

In *NLRB v. Ironworkers, Local 86,* 443 F.2d 544 (9th Cir. 1971), a labor Union was judged in civil contempt for failing to comply with a Court Decree enforcing a Labor Board Order requiring the Union to maintain a hiring hall on a non-discriminatory basis. The United States Court of Appeals for the Ninth Circuit ordered the Union to purge itself of contempt by fully complying with the Labor Board's order as set forth by the Court Decree and posting copies

of the Contempt Order at the Union hiring hall and business offices and mailing copies of the Notice of Contempt to all employers in the construction industry with whom the Local had a signed agreement and to immediately mail copies of the Notice of Contempt to all members of the Local Union and to read the Notice by an official of the Local Union to the members at their next general membership meeting. In addition, the Court ordered the Local Union to fully comply with the hiring hall procedures as ordered by the Labor Board and enforced by the Court for a period of three years. The Court further imposed upon failure of the Union to comply with the order to pay a fine of $5,000.00 on each future violation plus $500.00 per day so long as such non-compliance continued. In Appendix A of the Court of Appeals Decision, the hiring hall procedure as required by the Labor Board and enforced by the Court sets forth in detail in exactly the manner of how the Local Union should operate its hiring hall concerning requests and priorities of employment on dispatching. It is particularly important to point out that the Labor Board's order on the hiring hall procedures also requires the Local Union to maintain permanent written records which are open and available for inspection at all reasonable times. The broad authority of the Labor Board to regulate hiring halls of unions is further set forth in Section 12 of the Appendix A of the Opinion that the hiring hall procedures in effect establishes a master who in effect supervises and regulates the hiring hall procedure of the Local Union and serves reports on the Regional Director of the Labor Board. The master can hear any compaint, either oral or written of any applicant or member of the Union

who claims that the hiring hall procedure is not being followed. In effect, the Labor Board and Court of Appeal imposed a Labor Board "Trusteeship" over the operation of the Union's hiring hall.

It is difficult to define more broad and widesweeping powers by an administrative agency such as administered by the Labor Board concerning hiring halls of Local Unions. In this case, if the Petitioner had proceeded with the Labor Board by the filing of additional charges and had requested the Labor Board to conduct a further investigation and upon a finding of the abuses as alleged by the Petitioner, the Labor Board had the authority to provide all possible relief to Petitioner regarding job employment. However, it must be pointed out that the Labor Board as the expert administrative agency could very well have found against Petitioner's allegations and found that there was no abuse or violation of the Local Union's hiring hall operations.

The United States Supreme Court has itself on occasion determined the legality of the operation of the Union hiring hall under the National Labor Relations Act. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961) and *Local 60, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 365 U.S. 651 (1961).

The Court of Appeals has regularly enforced Labor Board orders against Unions for discriminatory referral practices. *Pacific Maritime Association v. NLRB*, 452 F.2d 8 (9th Cir. 1971); *NLRB v. International Longshoremans Association, Local 1581*, 489 F.2d 635 (5th Cir. 1974); and *NLRB v. Sea Farers International Union*, 496 F.2d 1363 (5th Cir. 1974).

The particulars in a case very similar to the facts as alleged by Petitioner in this case is contained in a decision of the United States Court of Appeals where a Labor Board order was upheld regarding job discrimination. *See NLRB, Local 4, Operating Engineers*, 456 F.2d 242 (1st Cir. 1971).

Conclusion.

The principles of the United States Supreme Court as established in *Garmon, supra, Borden, supra, Perko, supra* and *Motorcoach Employees, supra,* were to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. The State Court properly applied the objectives of the United States Supreme Court in holding that the subject matter of the cause of action in this case was preempted and that it did not matter whether recovery was sought on grounds of statutory or common law tort. The State Court correctly applied the principle that the nature of the activity must be ascertained to determine whether preemption applies. The label of an action as "emotional distress" or some other label that a State Court may attach to a cause of action cannot and should not change the essential nature of the conduct involved in the dispute.

The decision of the State Court accomplished what Congress and the United States Supreme Court have attempted to establish, the avoidance of different labor laws and policies that would be enforced throughout the Country and would vary with local attitudes towards labor Unions.

In *Motorcoach Employees, supra,* the United States Supreme Court made a historic, comprehensive and

articulate review of *Garmon* and subsequent cases and the possible consequences of allowing different tribunals issuing different remedies for the same unfair labor practices. Justice Harlan noted that there could run a spectrum from jail sentences to punitive damages to merely awarding back pay. Such a conflict in remedies in administration throughout the Country with fifty different States applying different remedies would produce a clear conflict between the Federal and State regulatory schemes and would lead to an impossible task of case by case supervision by the United States Supreme Court over matters that Congress intended to be left within the exclusive administration expertise of the Labor Board as interpreted and enforced by the Federal Courts.

The State Court correctly applied the Congressional intent and objectives in philosophy of the United States Supreme Court as set forth in *Garmon* and as recently as 1971 in *Motorcoach Employees,* and for this reason, the Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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